FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. Jurisdictional and due process principles preclude consideration of this case other than as conceived and resolved by the Ohio Supreme Court	2
(1) Effect on the jurisdiction of this Court	11
(2) Effect on appellant's right to appellate due process of law	13
II. The commercial free speech doctrine of the First Amendment protects acts of solicitation where there are no threats to public or client interests	17
(1) The purported distinctions between "advertising" and "solicitation"	20
(2) The historic similarity of "advertising" and "solicitation" as matters of etiquette	26
(3) The renewal of the practical objections to "solicitation" that were rejected in Bates as to "advertising"	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:	Page
Bates v. Arizona State Bar, 433 U.S. ___, 97 S.Ct. 2691 (1977)	20, 23, 26, 28, 29
Bradley v. Fisher, 13 Wall. (80 U.S.) 335 (1872)	14
Brotherhood of Railroad Trainmen v. Virginia Bar, 337 U.S. 1 (1964)	17
Cardinale v. Louisiana, 394 U.S. 437 (1969)	11
Cohen v. California, 403 U.S. 15 (1971)	29
Cole v. Arkansas, 333 U.S. 196 (1948)	13, 15, 16
De Jonge v. Oregon, 299 U.S. 353 (1937)	13
Dewey v. Des Moines, 173 U.S. 193 (1899)	12
Edwards v. South Carolina, 372 U.S. 229 (1963)	12
Garner v. Louisiana, 368 U.S. 157 (1961)	12
Linmark Associates v. Willingboro, 431 U.S. 85 (1977)	26
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	17, 20, 21, 23

	Page
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	13
In re Oliver, 333 U.S. 257 (1948)	14
Randall v. Brigham, 7 Wall. (74 U.S.) 523 (1868)	14
In re Ruffalo, 390 U.S. 544 (1968)	14, 15, 16
Schneider v. Irvington, 308 U.S. 174 (1939)	21
State v. Rubin, 301 Wis. 30, 229 N.W. 36 (1930)	8
United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967)	17
United States v. O'Brien, 391 U.S. 367 (1968)	23
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	18
Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)	20, 25
Whitney v. California, 275 U.S. 357 (1927)	11

Statutes: Page

28 U.S.C. §1257(2) 10

Ohio Rev. Code Ann. §2933.58 14

Miscellaneous:

63 A.B.A.J. 1538 (1977) 2

American Constitutional Law §12-7, pp. 599-600 (1978) . . 22

Boulton, *Conduct and Etiquette at the Bar*, 6th ed., 1975 27

Christensen, *Lawyers for People of Moderate Means*, 136 (Amer. Bar Foundation, 1970) 26

Comment, *A Critical Analysis of Rules Against Solicitation*, 25 U.Chi.L.Rev. 674 (1958) 26

Crabites, *Our Magnificent Legal Ethics*, 1 Nat. Law. Guild Q. 186 (1938) 26

Gerety, *Redefining Privacy*, 12 Harv.Civ.Rts.Lib.L.Rev. 233 (1977) 29

Edward L. Wright, *The Canons of Professional Ethics*, an address before the National Conference on Law and Poverty, Conference Proceedings (Wash. D.C., June 23-25, 1965) 141 19

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Appellant's reply brief is addressed to two major considerations that originate in the briefs filed by the three opposing bar groups:[1]

(1) Critical jurisdictional and due process issues emerge from the efforts of the Ohio brief and the California brief to transform this case from one of pure or benign solicitation into a stereotyped one of "ambulance chasing," replete with misrepresentations, overreaching, deception, and the like.

[1] The three briefs will be referred to herein as follows: (a) the Ohio brief, filed by the appellee Ohio State Bar Association; (b) the California brief, filed by the amicus State Bar of California; and (c) the ABA brief, filed by the amicus American Bar Association.

(2) The entitlement of an attorney's pure or benign solicitation of legal business to the protection of the First Amendment has been made evident by the utter vacuity of the "compelling state interests" that the ABA brief advances in support of the organized bar's total ban on such in-person solicitation.[2]

I

Jurisdictional and due process principles preclude consideration of this case other than as conceived and resolved by the Ohio Supreme Court.

The Ohio brief and the California brief have engaged in a totally impermissible effort to alter the nature of this case, both as it was decided below and as it has been presented to this Court. Ignoring the charges, the findings and the conclusions in the disciplinary proceedings against the appellant, those briefs have patently relitigated and reevaluated the facts of record, drawn their own findings and conclusions, and thereby convicted appellant of a host of malpractices never before alleged. In short, the appellant has never been given notice or an opportunity to defend against

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[2] The ABA brief for the most part (but see footnote 6, *infra*) faithfully reflects the Ohio Supreme Court's treatment of this case as one of simple solicitation of two accident victims. It does not follow the lead of the Ohio and California briefs in trying to disfigure the charges, the findings and the conclusions respecting appellant's solicitation of Carol McClintock and Wanda Lou Holbert. But cf. 63 A.B.A.J. 1538 (1977), a "news item" describing the instant case as "an 'ambulance-chasing' situation in the purest sense, with the lawyer visting an accident victim as she recuperated in the hospital." The Journal item also asserted that "While *Bates* cracked the door for lawyers to promote themselves and their businesses, these new cases [the *Ohralik* and *Smith* cases] could burst it off its hinges."

the nine charges now leveled at him in these briefs – (1) invasion of privacy, (2) high-pressure salesmanship, (3) undue influence, (4) overreaching, (5) misleading and deceptive statements, (6) divided loyalties, (7) inadequate representation, (8) breaches of fiduciary duties, and (9) vindictiveness. Ohio brief, pp. 24-25; California brief, p. 75.

The seriousness of the jurisdictional and due process consequences of this radical transmutation cannot be ignored or understated. In effect, those two briefs are asking this Court to disregard the findings and conclusions that form the basis of the instant appeal and to render an advisory opinion as to the constitutionality of applying DR 2-103(A) and DR 2-104(A) to an entirely different set of findings and conclusions. Indeed, as the party appellee before this Court, the Ohio State Bar Association has framed in its brief (p. 1) a Question Presented that is quite inconsistent with the ensuing arguments, a Question Presented that in no way reflects any issue before this Court other than one involving a simple, benign solicitation:

> "Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to discipline a lawyer for in-person solicitation of his legal services to persons injured in the same automobile accident who were, if anything, casual acquaintances."

Not one word in that version of the Question Presented suggests that the constitutionality of the DR provisions is to be resolved as if they had been applied to discipline a lawyer for in-person solicitation of two accident victims by the use of high-pressure salesmanship, misrepresentation, over-

reaching, divided loyalties, invasions of privacy, etc., etc., etc.

An appreciation of what has been attempted here must start with a recapitulation of what should have been obvious to the authors of the Ohio and California briefs – i.e., the charges, the findings and the conclusions reached by the Ohio disciplinary authorities. Those are the elements that ultimately define and confine the constitutional issue resolved by the Ohio Supreme Court, as well as the jurisdiction of this Court to consider the judgment rendered by the state court on that issue. And those are the elements that illuminate the critical due process problem that injects itself into this case if appellant's fate is now made to depend upon charges and findings as to which he has never had any notice or any opportunity to rebut.

To begin with, the appellant Ohralik was charged by the Board of Commissioners on Grievances and Discipline with the following misconduct only (App. 3a-4a):

> "On or about February 13, 1974, Respondent [Ohralik] learned that Carol McClintock and Wanda Lou Holbert of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.
>
> "On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.
>
> "Relator says that Respondent has violated DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility."

It is important to note that these charges contain not one syllable alleging the series of misconducts set forth in the Ohio and California briefs. There is no official charge, for example, that the appellant's solicitation conduct involved "dishonesty, fraud, deceit and misrepresentation" in violation of DR 1-102(A)(4). Nor is any charge leveled against appellant – as the Board of Commissioners was careful to explain (J.A.App. 14a) – "for his conduct in clinging to the contracts of employment obtained in the manner found above." Yet that latter charge, clothed in the language of "vindictiveness," has now been made in the California brief (pp. 74-75).

The appellant, in other words, was notified and given an opportunity to defend against a relatively simple charge of pure solicitation, composed of four basic elements: (1) a personal approach to two victims of an automobile accident; (2) a discussion with them of their legal rights and claims; (3) an offering of services as an attorney to represent them; and (4) his employment "thereupon" to represent each of the two solicited individuals. Those were the simple allegations that the complaint said amounted to violations of DR 2-103(A) and DR 2-104(A), violations which do not turn upon proof that the attorney has engaged in the other misconduct charged in the Ohio and California briefs. DR 2-103(A) and DR 2-104(A) concededly encompass the sim-

plest charges of pure solicitation, such as were here made. And it is out of that fact that the First Amendment claim arises.

The second stage in the recapitulation of the procedures below is found in the findings and conclusions reached by the trial body that heard and evaluated all the evidence, the Board of Commissioners acting through a Hearing Panel. That body exhibited the utmost fidelity to and respect for the simple and limited nature of the charges. At the outset of its findings (J.S.App. 11a), the Board noted that appellant had been charged with violations of the two disciplinary rules in that he had "solicited the Personal Injury cases of Carol McClintock and Wanda Lou Holbert." And in the ensuing discussion of the facts (J.S.App. 12a-14a), the Board made no reference whatever to the appellant having solicited in a manner involving invasions of privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive statements, divided loyalties, inadequate representation, breaches of fiduciary duties, or vindictiveness. And while appellant's main brief (pp. 10-14) has pointed out that some of the time sequences and other details in the Board's factual discussion are incorrect and misleading, such misstatements did not cause the Board to enlarge or go beyond the limited charge of having simply solicited two personal injury cases. Indeed, the Board's sole "FINDING OF FACT" is consistent only with this perceived limited charge; that finding bears repetition in full (J.S.App. 15a):

> "The evidence fully demonstrates that Respondent in seeking and obtaining agreements from Wanda Lou Holbert and Carol McClintock to represent them in their respective claims for damages arising from the accident of February 2, 1974,

> violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility. Respondent's defense that the solicitation of business by an attorney is protected by the First Amendment to the Federal Constitution is without merit. His Motion to Dismiss predicated on this ground was overruled."

It is significant that the report of the Board of Commissioners made no effort, with one exception, to assess the sufficiency or relevance of the testimony of Carol McClintock and Wanda Lou Holbert, and their respective mothers, from which the Ohio and California briefs now seek to extract proof of misrepresentation, overreaching, and the like.[3] Apparently the Board felt such testimony to be unworthy of belief and, even more so, to be quite irrelevant to the single charge before it. The Board was careful, however, to articulate the fact that appellant had not been charged with respect to "his conduct in clinging to the contracts of employment" and that, in any event, "there is insufficient evidence on which to base a finding that these activities, too, were violative of the Respondent's professional responsibili-

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[3] Neither the Ohio brief nor the California brief is content to rely upon the transcript or the record below in ascribing misconduct to the appellant. See, e.g., p. 24 of the Ohio brief: "Although not a part of the record of the proceedings in the court below, nonetheless, it is a fact that four days after appellant made the above sworn statement that he would abandon his claim against Wanda, he filed suit against her demanding $2,466.66 under a contract of employment." The California brief writers, who did not sit as the triers of fact and who were in no position to evaluate the credibility of witnesses, are excessively prone to make such non-record evaluations as appear at pp. 72-73 – i.e., that certain of Ohralik's statements introduced at the hearing were "patently false" and that he "may also have fabricated" certain of his other testimony at the hearing.

ties." J.S.App. 14a. That statement by the fact-finder completely undermines those portions of the Ohio brief (p. 24) and the California brief (pp. 46-51, 74) that try to manufacture charges and findings that the appellant was guilty of "vindictive" misconduct in "clinging to the contracts of employment."

It also bears repetition at this point that the report of the Board of Commissioners affirmatively found that (J.S.App. 14a):

> "Nor is there any evidence showing that Respondent's solicitation of Carol and Wanda Lou is part of an established or habitual course of conduct. Indeed, the only evidence of soliciting in the record is the pursuit of Wanda and Carol's causes."

This finding of a one-time solicitation venture is not without its own significance, for it has been judicially found that the "evils attendant upon solicitation are not apt to arise out of an occasional infraction of this canon of ethics by the lawyer." *State v. Rubin*, 201 Wis. 30, 32, 229 N.W. 36, 37 (1930).[4] These evils, added the Wisconsin court, "are more apt to appear when there is organized solicitation by men who are not members of the profession who may be tempted by their commercial zeal to stir up litigation and to attempt to create causes of action where none in reality exist." *Ibid.* But the immediate relevance of this

[4] While the Wisconsin court in the *Rubin* case said that it was unethical for a member of the bar to solicit business, "the court cannot say that three violations of this canon of ethics in a period of five years demonstrates that the offender is unfit to continue the practice of law." 201 Wis. at 32, 229 N.W. at 37. The court also noted that the referee in the disbarment proceedings had found "no proof in this case of dishonesty on his part in his relations with his [solicited] clients." 201 Wis. at 33, 229 N.W. at 38.

affirmative finding by the Board of Commissioners in the instant case is that it mirrors a careful and narrow reading of its own ultimate finding that the appellant did no more than solicit and obtain agreements from Carol McClintock and Wanda Lou Holbert.

The final step in the proceedings below, of course, was the review and adoption by the Supreme Court of Ohio of the limited finding of fact entered by the Board of Commissioners. Most of the Board's discussion of facts was repeated verbatim by the Supreme Court, a discussion which was addressed to a demonstration that the appellant did induce and solicit his representation of the two accident victims. And the court then made its critical determination (J.S.App. 4a, 48 Ohio St. at 220):

> "A review of the record before us reflects ample, uncontroverted evidence supportive of the finding of the Board of Commissioners on Greivances and Discipline that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), set forth above, *in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert* to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974." [Emphasis added.]

Here again is patent the fact that DR 2-103(A) and DR 2-104(A) were found violated solely by reason of Albert Ohralik's acts "in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert." There was no violation found or suggested by reason of soliciting and obtaining agreements in a deceitful, high-pressure or ambulance chasing manner; and indeed there could not be on the basis of the facts discussed in the court's opinion, for those facts

are utterly devoid of any indication of blatant misconduct in connection with the solicitations.

It was in light of that determination that solicitation *per se* is violative of DR 2-103(A) and DR 2-104(A) that the appellant raised his First Amendment challenge; and it was in light of that determination that the Ohio court rejected the challenge. Further reflecting that determination of a *per se* violation, the appellant invoked the appeal jurisdiction of this Court, under 28 U.S.C. §1257(2), to review the following Question Presented (J.S. 2-3):

> "Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to suspend a lawyer indefinitely from the practice of law for having orally solicited his legal services on two occasions, there being no claim of misrepresentation, overreaching, fraud, or other activity on any public interest or on any interest of the clients."

Neither in its motion to dismiss the appeal nor in its brief on the merits has the appellee Ohio State Bar Association quarreled with that formulation of the Question Presented. As noted above, the appellee's brief on the merits (p. 1) contains a not dissimilar Question Presented, one that does not put in issue before this Court any consideration of the constitutional effect of applying DR 2-103(A) and DR 2-104(A) to solicitations accompanied by any or all of the nine types of misconduct now charged in the Ohio and California briefs.

Several profound effects flow from these attempts to alter the federal constitutional issue that was properly raised and then resolved by the Supreme Court of Ohio:

(1) **Effect on the jurisdiction of this Court.** It is axiomatic that the jurisdiction of this Court to review a final judgment of a state court is restricted in several ways by the nature of the federal constitutional issue that was decided by the state tribunal. Thus when a case reaches this Court, review is limited to the specific federal question or questions considered and passed upon by the state court. *Whitney v. California*, 274 U.S. 357, 362 (1927). Other federal questions that were not presented in and either expressly or necessarily decided by the state court are beyond the jurisdictional ken of the Court. That is true even though "there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature." *Ibid.* This Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

In other words, the Court lacks jurisdiction in this instance to consider the constitutionality of applying DR 2-103(A) and DR 2-104(A) to solicitations marked by such misconduct as misrepresentation, overreaching, inadequate representation, and the like. That simply was not the federal question raised or decided below; nor did the Ohio court have occasion to interpret or apply those Disciplinary Rules with reference to such malignant forms of solicitation. All that the court below determined was that DR 2-103(A) and DR 2-104(A), as interpreted and applied, operated to proscribe the mere acts of "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert." And such benign acts, such *per se* violations of the Disciplinary Rules, were deemed to be without recourse to any First Amendment protections. That is the Ohio ruling that defines the metes and bounds of this Court's review jurisdiction. Indeed, were the last minute propositions advanced

in the Ohio and California briefs to be accepted as a basis for reviewing the Ohio judgment, this Court would be forced to render an advisory opinion on constitutional matters that were not considered or resolved by the Ohio court.[5]

It is no answer to say that the prevailing party below may advance in this Court different theories or arguments in support of the state court's judgment. See *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899), holding that, where only one federal question has been raised in the state court, a party may not "come into this court from a state court and argue the question thus raised, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised." Thus to urge that there is no First Amendment bar to suspending an attorney who solicits by means of misrepresentation is not to support the judgment of the Ohio Supreme Court. That court's judgment simply did not encompass or treat with that contention or the facts supposedly surrounding the contention. No federal issue was involved other than the First Amendment consequences of disciplining an attorney for having solicited and obtained agreements from the two accident victims.

This Court has unquestioned power to "make an independent examination of the whole record," *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), to assure itself that a state court's denial of a federal claim does not con-

[5] To the extent that the Ohio court may be said to have construed DR 2-103(A) and DR 2-104(A) to cover the type of solicitation here allged, this Court is bound by that interpretation. *Garner v. Louisiana*, 368 U.S. 157, 166 (1961).

stitute a forbidden intrusion on the principles of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). But this "constitutional fact" doctrine is equally unavailing as a jurisdictional crutch for reviewing the Ohio judgment as though it had determined the constitutionality of applying DR 2-103(A) and DR 2-104(A) to solicitations made in the context of misrepresentation and overreaching. The doctrine was never meant to serve as a means for uncovering additional facts that might have been used by the state court to resolve additional constitutional claims that might have been made. So to use the doctrine would significantly impair the historic relationship between this Court and the highest state courts, a relationship that limits this Court's reviewing power to the federal claims that were necessarily or expressly decided by the state courts.

(2) **Effect on appellant's right to appellate due process of law.** Not too surprisingly, the restructuring of the facts, the findings and the constitutional considerations, as sought by the Ohio and California briefs, would generate a massive problem of appellate due process. What those briefs are seeking is an affirmance by this Court of the Ohio suspension order upon charges that were never made, upon charges that the Ohio court never used in rejecting appellant's First Amendment claim. To affirm on that basis would involve this Court in precisely the kind of unfair process condemned in *Cole v. Arkansas*, 333 U.S. 196 (1948). And see *De Jonge v. Oregon*, 299 U.S. 353, 2[illegible] (1937).

No principle of procedural due process is more firmly established than that the entitlements of an individual – any individual – "to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a

right to his day in court – are basic to our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). That is a principle fully applicable to attorneys accused of professional misconduct; indeed, in that precise context the principle has been described long ago as a "rule of natural justice." *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 354 (1872). See also *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 540 (1868); *In re Ruffalo*, 390 U.S. 544, 550 (1968).

The appellant, of course, has been given no notice of any charges that he (1) invaded the privacy of Carol McClintock or Wanda Lou Holbert or their families, (2) engaged in high-pressure salesmanship, (3) used undue influence in obtaining retainer agreements from these two women, (4) engaged in some form of overreaching, (5) made misleading and deceptive statements, (6) involved himself in a situation of divided loyalties, (7) inadequately represented one or both of these clients, (8) breached his fiduciary duties to them, and (9) exhibited vindictive conduct or treatment of them.[6] Such charges, not having been made before the commencement of the disciplinary proceedings, cannot be added during or after those proceedings. That is the whole point of the *Ruffalo* decision, 390 U.S. at 551, which condemned the practice of amending disciplinary charges after the proceedings are underway "on the basis of the testimony of the accused" attorney. It must be considered even more objectionable to amend and add to the disciplinary charges – on the basis of the testimony adduced at the disciplinary proceedings – long after those proceedings have terminated and have reached this Court on appeal.

[6] To this list of late-blossoming charges must be added the assertion in the ABA brief (p. 20, n.6) that the appellant, in secretly recording conversations with a potential client, may have committed "a possible violation of the criminal law," i.e., Ohio Rev. Code Ann. §2933.58. Obviously, no such disciplinary or criminal charge was ever made against appellant in the proceedings below, and he was accorded no opportunity to defend himself against this cruel suggestion in the ABA brief. The disciplinary authorities were fully aware of these recordings, which were produced by the appellant only in defense against the single charge that he had solicited the two accident victims. See DR 4-101(C)(4), which permits an attorney to reveal the confidences or secrets of his client "to establish or collect a fee" or "to defend himself . . . against an accusation of wrongful conduct."

This Court, no more than any other appellate court, is simply not equipped to consider and resolve charges of professional misconduct never before made in the proceedings below. That is the very practical reason underyling the decision in *Cole v. Arkansas*, 333 U.S. at 202, that an accused individual is entitled to have the validity of his conviction "appraised on consideration of the case as it was tried and as the issues were determined in the trial court." There is just no way in which appellant – at this last stage in the appellate process – can marshal the facts and the evidence or produce other testimony or refute and rebut the nine or ten charges of misconduct now leveled at him.

The new charges, themselves, to say the least, are demeaning and degrading to the appellant's character and reputation. They are of the type that should never surface outside the controlled confines of a full due process proceeding, which cannot be provided at the appellate level. For that reason, appellant must refuse to follow the footsteps of the Ohio and California briefs, refuting and challenging each of their multitudinous allegations, assertions and suggestions of professional impropriety. This Court cannot and should not be a forum for resolving

such highly factual and highly controverted issues in the first instance. It matters not that these new charges are derived from the testimony already given at the hearing before the Board of Commissioners; to rely now on appellant's own testimony at that hearing to support these charges is to create the "trap" referred to in the *Ruffalo* case, 390 U.S. at 551 – the "trap" that appellant can now "be given no opportunity to expunge the earlier statements and start afresh."

Enough has been said to demonstrate the inappropriateness of the other suggestion in the California brief (p. 14) that this case be remanded to the Ohio Supreme Court to weigh "the strong public interests" to be served by suspending appellant from the practice of law. Those "strong public interests," of course, are precisely those which the Ohio and California briefs have asserted here for the first time.

It is intolerable to suggest that a remand is in order so as to give the Ohio Supreme Court a chance to consider an entire new set of professional misconduct charges. That court is no more equipped than this Court to shift the theory of the solicitation charge against appellant and to reassess his case on the basis of allegations that have never before been made, answered or resolved. The appellate due process doctrines enunciated in *Cole v. Arkansas, supra,* should be enough to demonstrate the unfairness and the impropriety of a remand under these circumstances.

The Ohio Supreme Court has resolved one critically important federal constitutional question: is a total and indiscriminate ban on solicitation, including in particular that which is not found to contain elements of misrepresentation, ambulance chasing and the like, consistent with the

values inherent in the First Amendment's commercial free speech doctrine? That is the question that must now be answered by this Court.

II

The commercial free speech doctrine of the First Amendment protects acts of solicitation where there are no threats to public or client interests.

At the heart of the constitutional problem posed in this appeal is the fact that this Court, in a series of cases of major importance, has held that the rules of professional ethics must give way to the First Amendment:

(1) *N.A.A.C.P. v. Button,* 371 U.S. 415, 429 (1963), which rejected the basic philosophy of DR 2-103(A) and DR 2-104(A) that solicitation "is wholly outside the area of freedoms protected by the First Amendment" and that the exercise of such freedoms can be foreclosed "by mere labels." The state, in other words, "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. at 439.

(2) *Brotherhood of Railroad Trainmen v. Virginia Bar,* 337 U.S. 1 (1964), where First Amendment protection was extended to a union's legal services plan whereby substantially all of the members' personal injury claims were solicited and channeled, on a private fee basis, to lawyers selected and touted by the union. The Court there noted that "lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." 337 U.S. at 8.

(3) *United Mine Workers v. Illinois State Bar Assn.,* 389 U.S. 217, 223 (1967), which rejected any notion that the First Amendment protections accorded solicitation in the *Button* case were limited to the solicitation of litigation in-

volving "political matters of acute social moment." Protected solicitation may also involve the solicitation of personal injury cases.

(4) *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971), which noted that the "common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." But even though the *United Transportation* case, like the other three, arose in the context of organizational-type solicitation, in each case the Court found that the individual attorneys who directly benefited from the organizational solicitation were also protected from the imposition of professional sanctions. Thus in the *United Transportation* case, where private practitioners were retained by union members who had been directly solicited by union investigators, the Court gave no suggestion that the lawyers who knowingly participated in the collective solicitation program were any less protected by the First Amendment than the organization itself.

Those four decisions have profoundly affected the organized bar's gradual realization that its canons and codes of professional responsibility cannot be insulated from the pervasive impact of the First Amendment and of other cherished constitutional provisions. It is no longer enough to brush aside First Amendment claims with an impassioned plea that the profession must protect its public image by a rigid enforcement of its disciplinary rules. As has been said by Edward L. Wright, at a time when he was Chairman of the A.B.A. Special Committee for Evaluation of

Ethical Standards and engaged in drafting the present Code of Professional Responsibility,[7]

> "Our canons of ethics are for the most part relevant to an earlier era. However undesirable the practices they condemn, they do not profoundly affect the social order outside our own group. . . .
>
> "In the past 5 years all the lawyers in this room have been acutely conscious of the series of opinions of the Supreme Court of the United States which have profoundly affected the practice of law as such. Specifically, we may address ourselves, as a committee, to the *Button* case, to the *Brotherhood* case, to the *Estes* case. No one in the American Bar Association has ever thought that the canons of ethics should be enshrined as constitutional principles. . . . Our committee is acutely conscious that any recommendations that it makes must be in the light of existing constitutional decisions and existing social conditions."

And so we turn to the justifications offered by the organized bar, as expressed in the ABA brief filed in this case, for resisting the intrusion of the First Amendment into its Disciplinary Rules designed to outlaw all forms of in-person solicitation by individual attorneys, unrelated to any kind of protected organizational activity. These justifications must, of course, be assessed against the principles developed by this Court in the above-mentioned organizational cases,

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[7] Edward L. Wright, *The Canons of Professional Ethics*, an address before the National Conference on Law and Poverty, Conference Proceedings (Wash. D.C., June 23-25, 1965) 141 at 143.

augmented by the principles subsequently developed in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), and in last term's ruling in *Bates v. Arizona State Bar*, 433 U.S. ___, 97 S.Ct. 2691 (1977). More specifically, the asserted justifications must be tested in light of the *Button* ruling, 371 U.S. at 438, that with respect to the bar's solicitation rules "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." And it bears repetition that *Button* also held that solicitation is not "wholly outside the area of freedoms protected by the First Amendment." 371 U.S. at 429.

(1) **The purported distinctions between "advertising" and "solicitation."** The ABA brief (pp. 3–6) begins with a studied effort to distinguish the "advertising" involved in *Bates* from the "solicitation" involved in the instant appeal. Solicitation, it is said, is more private in nature, less susceptible to meaningful regulation, and thus has a greater potential for abuse.

That there are differences between advertising and soliciting is a self-evident proposition. But it does not follow that the hand is to be constitutionally preferred to the mouth. The differences that obviously exist between written and oral communication have never been deemed to be of particular importance in the constitutional sense, warranting more stringent restrictions on the freedom to speak freely. It is far too late in the day to suggest that the constitutional values adhering to the freedom to write – or the freedom of the press – are at a higher level than the values associated with the right to speak freely, in private or in public. Both types of freedom have long been deemed to lie in equal parts "at the foundation of free government by

free men." *Schneider v. Irvington*, 308 U.S. 147, 161 (1939).

Thus the complaint that oral solicitation is more unregulable and therefore more likely to be abused can hardly serve as a constitutional excuse or as a compelling state interest justifying a total ban. What was said in *Bates* with respect to a similar argument advanced against opening the door to lawyers' written advertising is equally applicable here:

> "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latters' interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust." Slip opinion, p. 27.

And if the enforcement of reasonable rules against illicit forms of solicitation is more difficult than the enforcement of similar rules respecting improper advertisements, so be it. As the *Button* case holds, the First Amendment insists that the state and the organized bar accommodate themselves to the fact that some forms of solicitation lie within the ambit of protected freedom. No amount of difficulty in de-

tecting what lies outside that ambit justifies a proscription of what lies within. That difficulty, if it be one, is part of the price of freedom.

Equally unavailing is the additional suggestion of the ABA brief (p. 4) that commercial solicitation involves more "conduct" than "speech" and thus may warrant "somewhat less" First Amendment protection than the kind of newspaper advertising involved in *Bates*. As has been said in a recent authoritative study, Tribe, *American Constitutional Law* §12-7, pp. 599-600 (1978):

> "The trouble with the distinction between speech and conduct is that it has no real content. All communication except perhaps that of the extrasensory variety involves conduct. Moreover, if the expression involves talk, it may be noisy; if written, it may become litter. So too, much conduct is expressive, a fact the Court has had no trouble recognizing in a wide variety of circumstances. Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression.' It is thus not surprising that the Supreme Court has never articulated a basis for its distinction; it could not do so, with the result that any particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit."

The ABA brief (p. 5) has shown no lack of ingenuity in hanging oral solicitation on the "conduct" or "nonspeech" peg by identifying such elements as (1) personally approaching prospective clients, (2) employing agents to contact such

clients, and (3) entering into retainer agreements.[8] What is forgotten, however, is that these physical acts of walking toward a prospective client and signing a retainer agreement are quite subsidiary to what is said between the attorney and client. Certainly the ABA's concern with solicitation goes beyond the signing of a retainer agreement, the lifeblood of most lawyers; and certainly the ABA must be concerned with something other than the ability of a lawyer to walk in a straight line toward a prospective client. The real concern, of course, relates to what is said or communicated, particularly if what the attorney says is deceitful or wrong or misleading or overreaching in character. What the ABA and the Disciplinary Codes are really interested in, therefore, is suppressing free expression by the attorney, whether that expression be considered licit or illicit. Even if we accept the "speech-conduct" dichotomy, at least where both elements are combined in the same course of conduct, *United States v. O'Brien*, 391 U.S. 367, 377 (1968), teaches that governmental intrusion is impermissible unless the governmental interest "is unrelated to the suppression of free expression." Add to that lesson the reminder that *Button* advises that some kinds of solicitation do involve protected free expression. Thus the very primacy of the bar's interest in suppressing the protected along with the unprotected forms of expression renders illegitimate the "speech-conduct" justification for outlawing all forms of solicitation.

The ABA brief (pp. 5-6) also complains that, while advertising may serve "societal interests in assuring informed

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[8] With equal assurance, one could say that the preparation of a *Bates*-type lawyer's advertisement involves such "nonspeech" elements as (1) typing out the advertisment, (2) transporting it to the newspaper office, and (3) setting the advertisement in type.

and rational decision-making," soliciting merely emphasizes persuasion, cajoling and expedition of decision-making. And soliciting is said to discourage consumers from engaging in a critical "comparison" of the availability and prices of legal services, and to fail to "significantly increase the flow of information to potential consumers." But constitutionally speaking, the right to speak freely in a commercial context does not depend upon the degree of persuasivenss or the extent of the flow of information. Moreover, this suggestion confuses the free speech right of the soliciting lawyer with the potential client's interest in receiving adequate information and making informed decisions. That right and that interest are not necessarily coterminous; and certainly the consumer's lack of adequate information cannot justify cutting off the attorney's First Amendment right to articulate whatever information he may have to offer.

It may be conceded that in-person solicitation is not the ideal way for an injured person to select an attorney. But neither is an advertisement in a daily newspaper. Yet even after admitting that advertising does not provide a complete foundation on which to choose an attorney, this Court in *Bates* held that:

> ". . . it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative – the prohibition of advertising – serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in

> ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. See *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S., at 769-770. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." Slip opinion, pp. 22-23.

The same might be said of denying the consumer some of the relevant information and legal advice that a soliciting attorney might convey to them.

Moreover, to the extent that solicitation can be carried out in the constitutional manner assumed by the *Button* decision, the absolute ban imposed by DR 2-103(A) and DR 2-104(A) creates serious questions whether it "leave[s] open ample alternative channels for communication." *Virginia Pharmacy Board*, 425 U.S. at 771. If the accident victim is too injured to read a newspaper or a telephone directory or other lawyer listing, what options does he have if he cannot expect a visit from an honest soliciting attorney, ready and able to explain the victim's legal problems? Does the ABA expect him to remain vulnerable to the insurance adjusters, the hospital "runners" or the ill-informed advice of his lay friends?

In sum, DR 2-103(A) and DR 2-104(A) make no attempt to regulate the time, the place or the manner of the soliciting lawyer's speech. Cf. *Linmark Associates v. Willingboro*, 431 U.S. 85, 93 (1977). They simply ban all soliciting, even that which constitutes First Amendment speech. And the ABA has suggested no constitutional way to affirm such a ban.

(2) **The historic similarity of "advertising" and "solicitation" as matters of etiquette.** At this point it is appropriate to recall this Court's observation in *Bates* that "the ban on advertising originated as a rule of etiquette and not a rule of ethics" (slip opinion, p. 19). That same observation can be made about the organized bar's proscription of solicitation. This historic phenomenon has been frequently observed, and by no less than the American Bar Foundation. A report of that organization has said:[9]

> ". . . advertising and solicitation are very different from most of the activities covered by the profession's ethical rules. While there are those who regard advertising and solicitation as inherently evil—even in their customary commercial and business applications—most people would reject the idea that such activities by themselves involve moral turpitude or venality. Indeed, even when engaged in by lawyers and against the profession's ethical rules, advertising and solicitation activities are quite different from disloyalty to clients, misappropriations of client's funds, violation of client confidences, or perpetration of fraud upon clients or the courts. Henry S. Drinker made this point in his esteemed work on legal ethics, characterizing the profession's restrictions on advertising and solicitation as rules of professional 'etiquette' rather than professional 'ethics.'"

[9] Christensen, *Lawyers for People of Moderate Means* 136 (Amer. Bar Foundation, 1970). For incisive critiques of the organized bar's dislike of solicitation, see Comment, *A Critical Analysis of Rules Against Solicitation*, 25 U.Chi.L.Rev. 674 (1958); Crabites, *Our Maleficient Legal Ethics*, 1 Nat. Law. Guild Q. 186 (1938).

The ban on solicitation, in other words, has come to the American bar from the rules of etiquette of the English inns of court.[10] Solicitation has accordingly become known as contrary to the traditions and amenities of an honorable profession in America and an honorable legal club in Britain. And precisely because it is a matter of etiquette and grace, rather than *malum in se*, the rules against solicitation and the prospects of regulating rather than banning solicitation are somewhat uncertain. Much of what the ABA brief fears about opening the door to solicitation reflects the natural uneasiness of trying to regulate some of the social and professional graces expected of the legal profession.

(3) **The renewal of the practical objections to "solicitation" that were rejected in Bates as to "advertising."** With slight variations, each of the asserted objections in the ABA brief (pp. 6-16) to lifting any part of the ban on solicitation is a rerun of the objections raised as to lifting the total advertising ban, and thus rejected by the *Bates* decision. Here, of course, the objections are

[10] To this day, the ban on solicitation by British barristers is contained in a pamphlet entitled *Conduct and Etiquette at the Bar*, 6th ed., 1975, written by Sir. William Boulton of the Inner Temple.

clothed in the rubric of "important and legitimate state interests" that justify continuing the total ban on all forms of individual in-person solicitation. But those objections should fare no better than they did in *Bates*.

It is said, for example, that "most types" of personal solicitation initiated by lawyers "would not be susceptible to effective state regulations to prevent individuals from being misled or coerced." ABA brief, p. 7. Consumers are said to be less able to resist the entreaties of the soliciting lawyers who seek them out and to be more vulnerable to overreaching and undue influence. ABA brief, pp. 8-9. And the potential clients are allegedly more prone to heed the soliciting lawyers' appeals to emotions (fear, greed and revenge) as grounds for retaining their services, and thus to retain the first lawyer who approaches them. ABA brief, p. 9.

Precisely the same complaints could have been leveled against the types of organizational solicitation that were accorded First Amendment protection in the *Button-Brotherhood-United Mine Workers-United Transportation* line of cases; yet none of the consequences here feared seem to have ensued in those contexts. More importantly, the narrow issue presented by this appeal does not permit their legitimate First Amendment solicitation rights will mislead or appeal solely to the emotions of the prospective clients. As the *Bates* decision stated with respect to the organized bar's fear that opening the advertising door would flood the market with unscrupulous lawyer-advertisers, "most lawyers will behave as they always have. . . . For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward." Slip opinion, p. 27.

The ABA brief (pp. 12-14) also fears that solicitation will somehow invade the privacy of the persons solicited, and that lawyers will be crowded around hospital doors, calling and visiting prospective clients. This claim is somewhat ironical, coming from a profession that prides itself in digging out the facts and obtaining and preserving the confidences and secrets of clients, thereby forcing the clients to bare whatever privacy they may have with respect to the relevant. DR 4-101.

But with respect to the assertion of First Amendment rights, which is the only kind of solicitation here involved, the expression of ideas cannot be shut off to protect unwilling viewers or hearers without "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," since any "broader view . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971). And most assuredly, harms that exist only in the eye or mind of a voluntary beholder, such as the ABA, cannot justify restricting otherwise protected activity. See Gerety, *Redefining Privacy*, 12 Harv.Civ.Rts.Lib.L.Rev. 233, 277 (1977). In short, in assessing the First Amendment right of an attorney to engage in solicitation, we cannot assume that they will overreach the boundaries of that right and invade someone else's privacy or other protected interest. The burden of showing that such is likely or bound to happen is not met by the speculations of a brief writer.

The *Bates* decision has effectively demolished the last concern of the ABA brief (pp. 15-16) that solicitation may adversely affect the nature and quality of services which are thereafter rendered. Restraints on advertising, said the *Bates* decision, "are an ineffective way of

deterring shoddy work," and an attorney "who is inclined to cut quality will do so regardless of the rule on advertising." Slip opinion, p. 26. No reason appears why such comments are inapplicable to restraints on solicitation.

CONCLUSION

For these reasons, supplementing those in appellant's main brief, the judgment of the Supreme Court of Ohio should be reversed.

Basically at stake here is the efficacy of EC 1-1 of Canon 1 of the Code of Professional Responsibility: "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."

Because appellant tried to provide legal advice to his acquaintances when asked, because he offered them competent legal services when he saw they were in need, and yet becuase he engaged in no deceit or misrepresentation or overreaching, he stands convicted of solicitation *per se*. What a shoddy and cruel way to treat a member of the bar who has done no more than follow the basic tenet of EC 1-1.

Respectfully submitted,

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